

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ALLSTATE INSURANCE COMPANY,

Plaintiff,

v.

BROWNS POINT CHIROPRACTIC  
CENTER, P.S., a Washington  
Professional Service Corporation,  
DONALD L. FINLAYSON, D.C. and  
JANE DOE FINLAYSON, husband and  
wife; RICKY S. WALDNER and JACKIE  
WALDNER, his wife,

Defendants.

CASE NO. 3:10-cv-05607-KLS

ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS

The Defendants, Browns Point Chiropractic Center and Finlayson, ask this Court to exercise its discretion and dismiss the Plaintiff's claim which seeks relief under the Declaratory Judgment Act, 28 U.S.C. 2201(a). ECF No. 29. The Plaintiff opposes the motion. ECF No. 33. Based on its review of the pleadings, the Court concludes that it should not exercise its discretionary jurisdiction under the Declaratory Judgment Act (DJA) and therefore GRANTS the motion to dismiss.

**FACTS OF THE CASE**

Dr. Finlayson is a licensed chiropractor who operates Browns Point Chiropractic Center in Tacoma. Ricky Waldner was treated by Dr. Finlayson in 2007 for injuries related to an auto accident. In 2009 Ricky Waldner sued Dr. Finlayson, Browns Point Chiropractic Center, and his lawyer (for the automobile accident), in Pierce County Superior Court, alleging that they negligently “failed to inform and assist” him in filing an application for worker’s compensation benefits within the time allowed. ECF No. 1-2. Ricky and Jackie Waldner filed a Second Amended Complaint for Damages on February 18, 2010. ECF No. 34-1

Dr. Finlayson tendered the *Waldner* action to Allstate, his commercial general liability insurer, and to NCMIC Insurance Co., his professional liability insurer. Both insurers issued reservation of rights letters but also agreed to provide a defense pursuant to the reservation of rights.

On August 26, 2010 Allstate filed its Complaint for Declaratory Judgment with Respect to Insurance Coverage in this court. Federal jurisdiction is based on diversity of citizenship. Allstate seeks a determination from this Court “that there is no coverage under the Allstate policy for any claims against Dr. Finlayson and Browns Point Chiropractic arising out of or related in any way to the claims or transactions described in the Waldner second amended complaint.” ECF No. 1, p. 8. Ricky and Jackie Waldner are the only Defendants who have filed an Answer to this DJA. They have not asserted any cross claims or counter claims.

On September 29, 2010 NCMIC filed a claim in state court seeking declaratory relief against Finlayson, Browns Point Chiropractic Center, Ricky and Jackie Waldner and John A. Dodge. ECF No. 34-6. NCMIC Insurance seeks a declaration from the Superior Court that it does not have a duty to defend or afford policy benefits to the named defendants “as it relates to

the prosecution, defense and any duty to indemnify any judgment” arising out of the Waldner’s second amended complaint for damages. ECF No. 34-6, p. 10.

On November 15, 2010 Finlayson and Browns Point Chiropractic Center filed their Answer to the NCMIC State Court Complaint and included a Third Party Complaint against Allstate Insurance Company. In its Third Party Complaint, they assert that:

[t]he resolution of whether Allstate has an obligation to defend and/or indemnify Finlayson would involve adjudication of factual and legal matters that are in dispute and/or could prejudice Finlayson in the underlying *Waldner* action. Therefore, Finlayson seeks a declaration that the determination of whether Allstate has a duty to defend and/or indemnify Finlayson should be stayed pending resolution of the underlying *Waldner* action.

ECF No. 34-7, p. 10.

Finlayson and Browns Point Chiropractic Center also seek:

a declaration that Allstate has a duty to defend Finlayson in the *Waldner* action, a duty to indemnify Finlayson for the full amount of any liabilities incurred by Finlayson, whether by settlement or judgment, in the *Waldner* action. Finlayson also seeks an award of damages for the full amount of any liabilities incurred by Finlayson, whether by settlement or judgment, in the *Waldner* action.

ECF No. 34-7, -. 10.

### SUMMARY OF THE LAW

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), states

In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(emphasis added). The parties all agree that retention of this case under the Declaratory Judgment Act is discretionary with this Court.

1 “The ‘philosophic touchstone’ for the district court in considering whether to exercise its  
 2 discretion to retain jurisdiction over a declaratory judgment action lies in the factors enumerated  
 3 by the supreme Court in *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620  
 4 (1942). *See Dizol*, 133 F.3d at 1225. ‘The district court should avoid needless determination of  
 5 state law issues; it should discourage litigants from filing declaratory actions as a means of  
 6 forum shopping; and it should avoid duplicative litigation. *Id.*’ *American Casualty company of*  
 7 *Reading, Pennsylvania v. Krieger*, 181 F.3d 1113, 1118 (9<sup>th</sup> Cir. 1999).

8 The Ninth Circuit Court of Appeals also noted, in *Dizol*, that  
 9 [t]he *Brillhart* factors are not exhaustive. We have suggested other considerations,  
 10 such as “whether the declaratory action will settle all aspects of the controversy;  
 11 whether the declaratory action will serve a useful purpose in clarifying the legal  
 12 relations at issue; whether the declaratory action is being sought merely for  
 13 the purposes of procedural fencing or to obtain a ‘res judicata’ advantage; or  
 14 whether the use of a declaratory action will result in entanglement between the  
 15 federal and state court systems. In addition, the district court might also consider  
 16 the convenience of the parties, and the availability and relative convenience of  
 17 other remedies.” *Keans*, 15 F.3d at 145 (J. Garth, concurring).  
 18 *Government Employees Insurance Company v. Dizol*, 133 F.3d 1220, 1225 (9<sup>th</sup> Cir. 1998).

## 19 DISCUSSION

20 Initially Allstate argues that it is not a proper third party defendant in the state case  
 21 pursuant to Washington’s Civil Rules “and the claims relating to coverage should not be heard in  
 22 that case.” ECF No. 33, p. 8. That issue is a matter solely for determination by the state court in  
 23 the state court case. Clearly Allstate is free to bring such a motion and depending on the results  
 24 of that motion, may or may not come back to federal court.

Next, the Court must consider the *Brillhart* factors.

**Court should avoid needless determination of state law issues:** The relief requested  
 by Allstate in this case is the same relief, although on the opposite side of the coin, as requested  
 by Browns Point Chiropractic Center and Finlayson in their Third Party Complaint against

1 Allstate filed in the state court case. Both sides want a declaration regarding coverage including  
2 the duty to defend and indemnify. Allstate comes to the federal court based on diversity of  
3 citizenship. In such a case, Washington law provides the rule of decision for all of the  
4 substantive questions. Moreover, the substantive questions presented require consideration of  
5 insurance law peculiar to Washington State. There is no compelling federal interest.

6 **Court should discourage litigants from filing declaratory actions as a means of**  
7 **forum shopping.** At the time Allstate filed this federal declaratory judgment action there was no  
8 parallel state court case pending. Allstate filed this case on August 26, 2010. The state case  
9 involving coverage issues was not filed by NCMIC until September 29, 2010 and it was not until  
10 November 15, 2010 that Allstate was added to the state case as a Third Party Defendant. Allstate  
11 asserts that it had the right to file in federal court and that Finlayson and Browns Point  
12 Chiropractic Center are the ones who are involved in forum shopping. On the other hand,  
13 Finlayson and Browns Point Chiropractic Center assert good reasons for having the coverage  
14 issues of both insurers resolved in the same case before the same judge. The Court concludes  
15 that this is a neutral factor in determining whether the Court should retain jurisdiction of this case  
16 under the DJA.

17 **Court should avoid duplicative litigation.** The Court concludes that the claim by  
18 Allstate in this case is parallel to the Third Party claim of Finlayson and Browns Point  
19 Chiropractic Center in their Third Party Complaint. As noted above, the issue before both courts  
20 as to Allstate is whether its insurance policy provides coverage. The advantage, in state court, is  
21 that the coverage question for both insurers can and will be resolved at one time based on a  
22 consistent determination of the facts, definitions and application of state law. This avoids the  
23 very real possibility and concern of inconsistent rulings between the federal and state court in the  
24 application of purely state law.

